Supreme Court, U.S.
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No. 83-1474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRIS-TEETER SUPER MARKETS, INC.,

Petitioner,

vs.

PAUL LILLY, individually and on behalf of all others similarly situated,

and

CHRISTOPHER McKINNEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS LILLY, ET AL. IN OPPOSITION TO PETITION

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42 U.S.C. § 2000e *et seq.* 1

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

INTRODUCTION

A Writ of Certiorari should not be granted because: (a) The District Court and the Appellate Courts properly applied well-established law to the facts of this case, (b) The petitioner has failed to advance a single valid reason for the granting of a Writ, and; (c) The Petition is an unsupported criticism of the development of employment discrimination law by this Court.

I.

COUNTER STATEMENT OF THE CASE

A. Actions of the District Court.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq.[1] and

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[1] Hereinafter referred to as the Act. The petitioner's argument is limited to the interpretation of the Act.

42 U.S.C. § 1981. The respondent Lilly alleged retaliatory discharge for protesting racial discrimination at petitioner's Charlotte, North Carolina Distribution Center (59, 73-74).[2] Approximately twenty-five (25) persons intervened in the action. The intervenors had promotion, transfer, hiring, and termination claims (69-99, 130-132). A class was certified in July, 1977 (99-100). After the trial on the merits and prior to the entry of the judgment, the class was redefined to include only the employment practices of termination and promotion. The geographical scope consisted of the petitioner's warehouse and fourteen (14) stores located in Mecklenburg County (Charlotte), North Carolina. The successful plaintiffs

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[2] Undesignated numbers enclosed by parentheses refer to pages in the Appendix which accompanied petitioner's Petition.

were certified as class representatives (106-107). The District Court ruled against approximately half of the plaintiffs (11) and ruled in favor of the other half on their individual claims. Among others, Lilly (termination) and Gregory (constructive discharge) prevailed (69-99). Class-wide discrimination was found in promotions (115-120) and involuntary terminations (107-115).[3]

The District Court found, in reference to the involuntary termination practice, that (107): (i) the only written description of the policy or practice was a series of "Don'ts" which may or may not result in discipline or discharge; (ii) the system varied from one supervisor to another; (iii) an employee could

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[3] As the petitioner limits its Petition to the termination issue (Petition at pp. 1-2, 8), there will be no detailed description of any evidence other than the termination practice.

be terminated with or without prior warnings, and; (iv) the supervisory work force was overwhelmingly white.

The statistical findings of the District Court (107-113) were:[4] (a) blacks were involuntarily terminated between 1974-1978 at a rate of nine or ten standard deviations higher than one would expect given their presence in petitioner's workforce (110-112); (b) the petitioner, as noted by the lower courts, never offered an explanation for the substantial disparities (41, 114); (c) in 1975 blacks were involuntarily terminated at a rate of four (4) standards higher than one would expect

[4] The statistical test used was the standard binomial distribution test which was approved by this Court in Hazlewood School District v. United States, 433 U.S. 299, 311-312, n. 17 (1977) and Castaneda v. Partida, 430 U.S. 482, 496-497, n. 17 (1977). Attached hereto as Appendix A is a detailed description of the statistical findings.

given their presence in petitioner's workforce (113); (d) in 1974 fourteen percent (14%) of the petitioner's white workforce was involuntarily terminated, while the corresponding black percentage was twenty-five percent (25%)(109); (e) between 1974 and 1978, twenty-one percent (21%) of all white terminations were involuntary as compared to thirty-seven point two percent (37.2%) of all black terminations (108),[5] and; (d) between 1974 and 1978, the petitioner's white workforce increased from 1,546 persons to 2,372 persons. This is an increase of 53.4%. During the same time period, the petitioner's black workforce decreased from 527 persons to 322 persons. This is a decrease of 38.9%.

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[5] These are the figures used by the petitioner throughout their Petition. The petitioner completely fails to mention the results of the statistical testing in its Petition.

The petitioner never offered an explanation as to why there was a large decrease in the black workforce and an even larger increase in the white workforce (128).

The District Court also found that (113-114): (i) white employees who were tardy were not terminated while black employees who were tardy were terminated; (ii) a black employee, without any prior written warnings, was demoted while a white employee received numerous written warnings before any action was taken against him; (iii) a white employee received a warning for tardiness after he was tardy sixteen (16) times in two (2) months, and; (iv) a white employee who missed 38.4% of the working hours between February 13, 1978 and April 4, 1978 and who had ten (10) unexcused absences between April 4, 1978 and June 19, 1978 had no warnings.

B. The Opinion of the Court of Appeals. The Court of Appeals, in summary,[6] (a) affirmed the class certification (21-32); (b) affirmed the finding of class-wide discrimination in involuntary terminations (36-41); (c) reversed the finding of class-wide discrimination in promotions (41-46); (d) affirmed the findings of individual claims of discrimination of three (3) individuals including a termination claim and a constructive discharge claim (49-52), and; (e) vacated and remanded for further consideration the individual promotion/transfer claims of discrimination of ten (10) other plaintiffs who prevailed in the District Court (46-49).

In discussing the class-wide ter-

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[6] The opinion is reported at 720 F.2d 326 (4th Cir. 1983).

mination issue, the Appellate panel discussed the statistical evidence. In doing so, it stated that the test results "ruled out chance as a cause of the disparity in the termination rates." (39-40). As a result of ruling out chance as the cause,

> . . . plaintiffs thereby made out a prima facie case of class-wide discrimination, thus shifting the burden to Harris-Teeter to come forward with a credible lawful explanation for the disparity. (40)

The panel also credited the District Court's findings that: petitioner's termination policy was highly discretionary; the policy, in specific instances, had been applied unevenly to blacks as against whites; whites, if at all, received warnings only after extensive absences or tardies while blacks were terminated for insubstantial reasons (40-41). It noted that Harris-Teeter never advanced a reason for the statisti-

cally significant disparities between the white and black termination rates (41). The panel further stated that:

> Harris-Teeter advanced no explanation for the disparity between the black and white termination rates, instead arguing that the plaintiffs' statistics "showed only that both blacks and whites had committed dischargeable offenses and had been discharged." That assertion is plainly incorrect, for the standard deviation analysis demonstrates that the significant disparity between the termination rates was not due to chance, but instead to some other cause (40). . . . that cause is presumed to be unlawful discrimination until the defendant shows otherwise, . . . and Harris-Teeter failed to to do so here (41).

II.

SUMMARY OF ARGUMENT

The lower courts, based upon overwhelming evidence of discrimination, properly applied the well-established law of this Court in finding and affirming intentional discrimination. The petitioner advances arguments which this Court has rejected in the past and

should reject again. The petitioner fails to advance a single valid reason for the issuance of a Writ. The petitioner describes the evidence incorrectly and fails to describe all of the relevant evidence. The petitioner is seeking to avoid the appropriate consequences of its failure to explain the gross disparities (in excess of nine (9) standard deviations) between the involuntary terminations of blacks and whites. The petitioner, without the support of a single valid reason, seeks to avoid the consequences of its discriminatory actions. Careful analysis of the facts and the applicable law reveal that the petitioner's arguments lack any merit.

III.

ARGUMENT

A. The Court of Appeals And the District Court Properly Applied Well-

Established Principles of Law to the Facts.

It must be stressed that the Petition does not challenge the findings of the District Court and does not challenge the validity of either the class certification or its affirmance.

The petitioner argues that "the subject of proof . . . is, as exemplified by the rulings of the courts below in this case, in a state of serious disarray which needs and requires correction and guidance from this Court." (Petition, pp. 22-23). In fact, there is no conflict among Circuit Courts of Appeal or violation of the case law established by this Court. There is no "disarray" except for that in petitioner's arguments.

The petitioner's assertion ignores the well-established law of the Act applied by the lower courts. In

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), this Court stated that:

> And because it alleged a system-wide pattern or practice . . . the Government had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice. 431 U.S. at 336.
>
> Statistics are equally competent in proving employment discrimination cases. 431 U.S. at 338.

See also Hazlewood, supra, 433 U.S. at 307-308. Gross statistical disparities alone can establish a prima facie case. Hazlewood, supra, 433 U.S. at 307-308 (citing Teamsters).

The respondents met their burden when they produced statistical evidence (of nine to ten standard deviations) which substantially exceeded the two to three standard deviations standard of Hazelwood. 433 U.S. at 309, f.n. 14. In addition

to the statistical evidence, the respondents produced evidence which shows that: (i) the black proportion of the petitioner's workforce decreased substantially over a four year period while the white proportion increased even more substantially; (ii) the termination policy lacked written criteria and guidelines; (iii) the discipline meted out to an individual was a function of the unfettered discretion of an overwhelmingly white supervisory workforce; (iv) there were specific instances of differential treatment between blacks and whites, and; (v) whites either received warnings only after long term consistent violations of the rules or else received no warnings at all after such violations.

The termination system's lack of written criteria and its control by an overwhelmingly white supervisory work-

force with unfettered discretion, when coupled with the significant statistical disparities, are features which have been condemned as badges of racial discrimination as well as perpetuating racial discrimination. See e.g., Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)(failure to provide clear criteria for selection or written job descriptions condemned); Brady v. Thurston Motor Lines, ____F.2d____, 33 FEP Cases 1373, 1374, 1379 (4th Cir. 1984)(absence of written job descriptions and qualifications, failure to post job openings, subjective nature of personnel decisions, and all white supervisory workforce); Carroll v. Sears, Roebuck and Company, 708 F.2d 183 (5th Cir. 1983)(unwritten, subjective criteria for promotion condemned); E.E.O.C. v. Ford Motor Company, 645 F.2d 183, 198 (4th

Cir. 1981), rev'd on other grounds, _____U.S._____ (1982)(condemning word-of-mouth hiring in all male workforce), and; Baxter v. Savannah Sugar Refining, 495 F.2d 437, 441 (5th Cir. 1974)(condemning the total dependence of blacks upon white supervisors for positive treatment).

The respondents, through the use of the combined evidence described above, established a strong case of discrimination. See Teamsters, supra, 431 U.S. at 335-340.

The petitioner complains " . . . how do the figures prove that any black employee was discharged 'because of such individual's race?'" (Petition, p. 15). The figures, along with the other evidence, show that: chance does not explain the gross statistical disparities; petitioner failed to offer any cre-

dible explanation for the gross disparities; blacks are treated differently; whites, if warned at all, are only warned after consistent long term violations of the rules, and; blacks are discriminated against because the features of the termination policy allow for and encourage such discrimination by a white supervisory force.

In response to the respondents' prima facie case, the petitioner was required to attempt a rebuttal by stating defenses such as: (i) the statistics were inaccurate; (ii) pre-Act actions were improperly included; (iii) post-Act actions have been non-discriminatory, or; (iv) some credible explanation for the statistical disparities. See e.g., Hazlewood, supra, 433 U.S. at 309-311 and Teamsters, supra, 431 U.S. at 360. As stated by the Appellate Court, the peti-

tioner never explained the disparities between the black and white involuntary terminations (41).

As can be readily determined from the foregoing, the lower courts applied well-established law in an entirely appropriate manner. The guidance which the petitioner seeks from this Court is already present in the above-cited cases and is not needed in this case. Seen most charitably, the "guidance" petitioner seeks is the unwarranted overturning of all of the decisions relating to the proof of a case of a pattern or practice of discrimination in employment. Seen realistically, the Petition is an unjustified delay of respondents' proved entitlement to relief.

B. The Use of Statistics by the Lower Courts to Find Discrimination and Affirm Said Finding was Entirely Appropriate.

The petitioner argues that the use of statistics by the lower courts was improper. It should be stressed that the petitioner does not challenge: the accuracy of the figures; the accuracy of the test results or the validity of the utilized methodology.

The petitioner's argument is exactly the same as that rejected by this Court in Teamsters, 431 U.S. at 339-340 (text and footnote 20). Petitioners in that case argued:

> . . . statistics can never in and of themselves prove the existence of a pattern or practice of discrimination or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. 431 U.S. at 339.

This Court has stated at least twice that gross statistical disparities alone can create a prima facie case. Hazlewood, supra, 433 U.S. at 308-309 and Teamsters, supra, 431 U.S. at 339. The

statistical results in this case (exceeding nine (9) standard deviations) were unexplained "gross disparities."[7]

Petitioner's arguments purposefully ignore this Court's holding that "long lasting" gross disparities "are probative . . . because such imbalance is often a telltale sign of purposeful discrimination . . ." Teamsters, supra, 431 U.S. at 339, 340, f.n. 20.

The actions of the lower courts do not require the racial balancing described by the petitioner (Petition, pp. 20-21). The statistics utilized by the lower courts were examined, along with other evidence, only to determine whether purposeful (intentional) discrimination was present. Their use was entirely appropriate. The petitioner's argument

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[7] See p. 4, supra. Furthermore, there was additional evidence which supported the actions of the lower courts. See pp. 3-6, supra.

about the role of statistics should be rejected as it was by this Court in Teamsters.

C. The Use of a Legal Presumption of Discrimination in Favor of Each Class Member was Entirely Appropriate Since a Pattern and Practice of Discrimination was Proved.

The petitioner argues that the legal presumption of discrimination in favor of each class member is "absurd" (Petition, p. 22). The presumption of discrimination was created after overwhelming evidence of a pattern of discrimination was found. The absurdity is that, in the face of overwhelming evidence of discrimination by the employer, the petitioner believes that there should be no presumption. A similar challenge was rejected in Teamsters, 341 U.S. at 357-363, and this method of proof has been approved by

this Court. See also Franks v. Bowman Transportation, 425 U.S. 747, 771-774 (1976).

Petitioner argues that 229 persons have received a legal presumption of discrimination,[8]

> . . . without exploration or even inquiry as to the causes or reasons or circumstances of their respective discharges . . . not a word of testimony nor any shred of evidence has been presented with regard to the cause or circumstances of the discharge of any . . . individuals. (Petition, pp. 9, 11).

These "individuals" faced and met the burden of proving a pattern of discrimination. The petitioner's only response was to show that both blacks and whites were involuntarily terminated.

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[8] The petitioner asserts that the findings of two individual instances of discriminatory treatment cannot establish a class-wide presumption of discrimination (Petition, pp. 19-20). As demonstrated above, the presumption was based on much more than the claims of two persons.

Respondents never asserted that no whites were terminated; they asserted and proved that blacks were more likely to be fired and that the termination policy was used in a discriminatory manner. The petitioner never explained the statistical disparities. Thus, the case should enter the Stage II proceedings with each claimant having a presumption of discrimination in his or her favor.

The petitioner treats the "legal presumption" as if it were irrebutable. However, as established by this Court in Teamsters and Franks, the employer can overcome the presumption by showing at Stage II proceedings, if it can, through the appropriate weight of evidence that a person was terminated for a legitimate, non-discriminatory reason.

The petitioner's arguments concerning the improper role of statistics

and the "absurd" legal presumption of discrimination should be rejected. The well-established authorities of this Court allows for the proper use of statistics and the creation of the presumption. The petitioner simply failed to explain away its racial discrimination and is now seeking to avoid the consequences of its failure to provide equal employment opportunity.

D. Intentional Discrimination was Proved.

In its Petition, the petitioner argues several times that the Act is "individualized" (Petition, p. 10) and that the respondents failed to prove intentional discrimination. These arguments are meritless. In its discussion, the petitioner speaks of "disparate" treatment and impact. It incorrectly asserts that in a disparate impact case

there must be proof of an intent to discriminate (Petition, pp. 12-13).[9]

The Act is not limited to "individualized" treatment when the requirements of F.R.C.P. Rule 23 are met.[10] Class-wide relief is to be granted where circumstances dictate such relief. See e.g., Franks, supra, 424 U.S. at 771-773 and Moody, supra, 422 U.S. at 419-422. The Act becomes "individualized" at the Stage II level when claimants, armed with the presumption of discrimination, seek relief. This relief will be denied if

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[9] Discriminatory motive does not need to be proven in an impact case; in a disparate treatment case, proof of discriminatory motive is critical and can be inferred, in some cases, from differential treatment. See e.g. Teamsters, supra, 431 U.S. at 335, note 15; Griggs v. Duke Power, 401 U.S. 424, 432 (1971).

[10] As stated above at p. 11, the petitioner does not challenge either the District Court's class certification nor the Appellate Court's affirmation of the class certification.

the employer can show that the claimant was terminated for a legitimate reason. The petitioner's approach is to eliminate the class action rule and require 229 individual trials, even though the requirements of the class action rule have been met.

This is a disparate treatment case. As discussed in detail above, respondents presented statistical evidence along with evidence of general policies, overt acts of discrimination and differential treatment. Patterns and practices can be and were used to establish intentional discrimination. See e.g., Teamsters, 431 U.S. at 335-343 (text and footnotes 15-24). The petitioner argues that since there was no proof with regard to the individual discharges, the remaining proof[11] is inadequate to support a

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[11] Incorrectly described by the petitioner as showing that 37.2% of all black

finding of intentional discrimination (Petition, pp. 13-15). As discussed above, the evidence (pp. 3-6, supra) and law (pp. 11-17, supra) support the lower courts' finding and affirmance of intentional discrimination. Statistics such as those present in this case alone can create a prima facie case. If the prima facie is neither statistically explained away nor credibly challenged in a sufficient manner (as is present in this case), a finding and affirmance of intentional discrimination is the appropriate result.

IV.

CONCLUSION

A Writ of Certiorari should not be

Footnote 11 continued

and 21% of all white terminations were involuntary (Petition, p. 14). This description is a deliberate attempt of the petitioner to avoid the test results and the other proof described above at pp. 3-6.

granted for the reasons set forth above. Given the evidence, the lower courts correctly applied well-established law. The petitioner advances arguments which this Court has rejected in the past and should do so again. The petitioner seeks to avoid the consequences of its racial discrimination in employment, which Congress determined to end in 1964. Most employers do not find themselves "hopelessly entangled in 'imbalance' violations of federal law" (Petition, p. 22) because most employers do not violate the law and do provide equal employment opportunity. Petitioner's irrational arguments are so without merit in light of the evidence present in this case and the well-established law of this Court, that they should be summarily rejected. Petitioner has failed to provide a single valid reason for the issuance of a Writ.

Respectfully submitted this the

27 day of March, 1984.

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APPENDIX
(111-113)

Years	Total Involuntary Terminations	B% of H-T Workforce	Expected #B Terminations
1974-1978	815	15.4[1]	125.5
1974-1978	815	15.7[2]	
1974-1978	815	15.3	
1975	299	16.1	48

[1] Median annual percentage of workforce between 1974-1978.

[2] Average annual percentage of workforce between 1974-1978.

APPENDIX
CONTINUED

Actual Number	Difference
299	103.5
229	
229	
74	26

Standard Deviation	Number of Expected Deviations Beyond Expected
10.304	10.045
	9.725
	10.149
6.356	4.09